IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

RICHARD GOETTLE, INC.,	:	APPEAL NO. C-090214 TRIAL NO. A-0605975
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
BOVIS LEND LEASE, INC.,	:	
and	:	
BPB WEST VIRGINIA, INC.,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

This is an appeal from the trial court's grant of summary judgment to defendants-appellees Bovis Lend Lease, Inc., ("Bovis") and BPB West Virginia, Inc. ("BPB"), collectively referred to as defendants. BPB was the owner of a construction site in Moundsville, West Virginia, and it had hired Bovis to act as the construction manager for a project on that site involving the construction of a gypsum wallboard plant. Defendants had solicited bids for the construction of the plant's foundation. Plaintiff-appellant Richard Goettle, Inc. ("Goettle"), a contractor that specialized in deep foundation, submitted a bid on the project.

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Goettle submitted a bid for a steel foundation in response to the defendant's initial solicitation, and it additionally submitted an alternate, less expensive bid for a foundation system involving auger-cast piles. Defendants received no other bids for an auger-cast-pile foundation. On June 13, 2006, Goettle CEO Douglas Keller and project manager Brian Heck traveled to West Virginia to meet with defendants regarding Goettle's bid. At this meeting, defendants were very interested in Goettle's alternative bid for an auger-cast-pile foundation. No contract was signed at this meeting and no explicit terms were decided, but Goettle left the meeting with the belief that its bid for an auger-cast-pile system had been accepted.

Following this meeting, Goettle submitted additional information on an auger-cast system to defendants, and the parties engaged in a conference call on June 20, 2006. Specifics of the auger-cast system were discussed in detail during this conference call. At the close of the call, Goettle asked defendants when it would receive a letter of intent regarding the acceptance of its bid. According to Goettle, defendants responded that Goettle would receive such a letter by the following Friday. But according to defendants, Goettle was never told that it specifically would receive a letter of intent by the named date. Rather, defendants maintained that they told Goettle that a letter of intent would be issued by that date, but not that it would necessarily be issued to Goettle.

Unbeknownst to Goettle, defendants had solicited additional bids for an auger-cast-pile foundation, using Goettle's bid as a benchmark. Subsequent to the conference call, Goettle made several requests for a letter of intent or contract from the defendants. On June 28, 2006, defendants emailed Brian Heck and asked for Goettle's best and final bid on the auger-cast system. According to Heck, he did not receive this email until July 5, 2006, because he had been on vacation. Goettle did not submit another

bid, and defendants awarded the foundation-construction contract, involving auger-cast piles, to another company.

Goettle filed suit against defendants, asserting claims of breach of contract and promissory estoppel. The trial court granted summary judgment to defendants, and this appeal followed.

We review a trial court's grant of summary judgment de novo.[2] Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.[3]

In its first assignment of error, Goettle argues that the trial court erred in granting summary judgment to the defendants on Goettle's claim for breach of contract. To succeed on a claim for breach of contract, a plaintiff must prove the following the elements: the existence of a contract, performance by the plaintiff, breach by the defendant, and damages suffered by the plaintiff.[4] The existence of a contract is established when the parties mutually assent to the contract's terms, and the parties have a meeting of the minds with respect to terms that are definite and certain.[5]

Goettle asserts that its auger-cast-pile bid constituted an offer, which defendants accepted through their course of conduct. Specifically, Goettle cites the conference call that occurred on June 20 and the defendants' promise that a letter of intent would be issued. Goettle further argues that it provided detailed information to defendants that it would not have provided absent a contract between the parties.

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[2] *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.
[3] *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.
[4] *Brunsman v. W. Hills Country Club*, 151 Ohio App.3d 718, 2003-Ohio-891, 785 N.E.2d 794, ¶11.
[5] *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134.

We cannot agree with Goettle, and we conclude that the record does not demonstrate the existence of a contract. The record contains no evidence of the terms of the alleged contract, including, as the trial court noted, payment, price, performance, start date, schedule, default, testing/inspection, guarantees, indemnification, and the like. No written document was executed, which is notable given that the defendants' bid package stated that, following acceptance of a bid, a written contract was necessary to contract formation. Moreover, Goettle's own behavior supports our conclusion that a contract had not been formed. Following its conference call with the defendants, Goettle repeatedly contacted the defendants regarding the issuance of a letter of intent or contract. Such documents would not have been necessary had a contract already been formed.

Goettle further argues under this assignment of error that an implied-in-fact contract existed between the parties. As this court has stated, "implied contracts are those that are not created or evidenced by the explicit agreement of the parties, but inferred by the law as a matter of reason and justice. Contracts implied in fact arise from the conduct of the parties, or circumstances surrounding the transaction, that make it clear that the parties have entered into a contractual relationship despite the absence of any formal agreement."[6] The record is clear that an implied-in-fact contract did not exist. As we have noted, following the last communication between the parties, Goettle contacted defendants regarding the issuance of a contract or letter of intent. Had it believed that a contract already existed, Goettle would not have made such requests.

Our conclusion that no contract existed between the parties should not be read to condone the behavior of the defendants in this case. Their actions were

[6] *B&J Jacobs, Co. v. Ohio Air, Inc.*, 1st Dist. No. C-020264, 2003-Ohio-4835, ¶9.

questionable, and the record clearly indicates that they were not entirely honest with Goettle concerning their actions. But questionable actions do not equate to an actionable claim for breach of contract. No express or implied contract existed between the parties. The trial court properly granted summary judgment on Goettle's claim for breach of contract, and the first assignment of error is overruled.

In its second assignment of error, Goettle argues that the trial court erred in granting summary judgment to the defendants on Goettle's claim for promissory estoppel. To establish a claim of promissory estoppel, a plaintiff must prove the following: that the defendant made a clear and unambiguous promise; that the plaintiff relied upon that promise; that the plaintiff's reliance was reasonable and foreseeable; and that the plaintiff was injured as a result of its reliance on the promise.[7]

In this case, Goettle failed to establish that the defendants made a clear and unambiguous promise. The record indicates that, during the June 20 conference call, the parties discussed the issuance of a letter of intent. But the defendants never clearly promised to issue such a letter to Goettle, nor did they make any other statement clearly and unambiguously awarding the foundation contract to Goettle. Further, the record does not indicate that Goettle relied on any promise made by the defendants during the conference call. Following this call, Goettle made several attempts to discern from the defendants when a letter of intent or contract would be issued. They did not begin work on the foundation project.

The trial court properly granted summary judgment to the defendants on Goettle's claim for promissory estoppel, and the second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

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[7] *Stumpf v. Cincinnati Inc.* (Dec.26, 1997), 1st Dist. Nos. C-960605 and C-960632.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., SUNDERMANN and **MALLORY, JJ.**

To the Clerk:

Enter upon the Journal of the Court on December 16, 2009

per order of the Court _____.
Presiding Judge